Petition

81-2104

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No.

In the Supreme Court of the United States

Term, 1982

UNITED STATES OF AMERICA,
Respondent

v.

ERENO LEWIS, JR.,
Petitioner

PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTIONS PRESENTED FOR REVIEW

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1. Is a criminal defendant deprived of Fifth and Sixth Amendment rights when the trial court refuses to allow evidence that he had admitted his intention to give false testimony at trial?

2. Is a criminal defendant deprived of Fifth and Sixth Amendment rights when the trial court allows a last minute amendment of the indictment which leads to a different crime being charged and denies the defendant a continuance to prepare his defense?

3. Is a criminal defendant deprived of Fifth and Sixth Amendment rights when after that defendant's decision not to plead guilty, the U.S. Attorney retaliates by reindicting that defendant on additional and more serious charges?

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UNITED STATES OF AMERICA,

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PETITION FOR WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The petitioner, Ereno Lewis, Jr., hereby petitions that Writs of Certiorari issue to review the opinion of the United States Court of Appeal for the Third Circuit in the cases docketed to 81-2065 and 81-2066 of February 22, 1982, (rehearing denied on March 17, 1982.)

OPINIONS BELOW

The opinion of the Court of Appeals has not been reported but is printed in the Appendix, pp. 1a-3a. The opinion of the United States District Court for the Middle District of Pennsylvania is not reported but is printed in the Appendix, pp. 6a-15a.

STATEMENT OF JURISDICTION

This petition is timely filed pursuant to Supreme Court Rules 20.1 and 20.4.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254 (1).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution, provides as follows:

> "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment of indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation."

The Sixth Amendment to the United States Constitution, provides as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense."

STATUTES INVOLVED

Title 18, United States Code, Section 659 provides, in pertinent part, as follows:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any pipeline system, railroad car, wagon, motortruck, or other vehicle, or from any tank or storage facility, station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitutes an interstate or foreign shipment of freight, express or other property; or Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen. . .
>
> * * *
>
> Shall in each case be fined not more than $5,000 or imprisoned not more than ten years, or both; but if the amount or value of such money, baggage, goods or chattels does not exceed $100, he shall be fined not more than $1,000 or imprisoned not more than one year, or both."

* * *

Statutes Involved

Title 18, United States Code, Section 371 provides as follows:

> "If two or more persons conspire either to commit any offense against the United States, or to defraud the United States, or any agency thereof in any manner of for any purpose, and one or more of such persons do any act to effect the object of the conspiracy, each shall be fined not more than $10,000 or imprisoned not more than five years, or both.
>
> If, however, the offense, the commission of which is the object of the conspiracy, is a misdemeanor only, the punishment for such conspiracy shall not exceed the maximum punishment provided for such misdemeanor."

RULES INVOLVED

Federal Rule of Criminal Procedure 7 provides, in pertinent part, as follows:

> "Rule 7. The Indictment and the Information
>
> (a) Use of indictment or information. An offense which may be punished by death shall be prosecuted by indictment. An offense which may be punished by imprisonment for a term exceeding one year or at hard labor shall be prosecuted by indictment or, if indictment is waived, it may be prosecuted by information. Any other offense may be prosecuted by indictment or by information. An information may be filed without leave of court.
>
> * * *
>
> (e) Amendment of information. The Court may permit an information to be amended at any time before verdict or finding if no additional or different offense is charged and if substantial rights of the defendant are not prejudiced."

* * *

Federal Rule of Evidence 613(b) provides as follows:

> "(b) Extrinsic evidence of prior inconsistent statement of witness. Extrinsic evidence of a prior inconsistent statement by a witness is not admissable unless the witness is afforded an opportunity to explain or deny the same and the opposite party is af-

forded an opportunity to interrogate him thereon, or the interests of justice otherwise require. This provision does not apply to admissions of a party-opponent as defined in rule 801 (d) (2)."

Federal Rule of Evidence 803 (3) provides as follows:

"The following are not excluded by the hearsay rule, even though the declarant is available as a witness: . . .

(3) Then existing mental, emotional, or physical condition. A statement of the declarant's then existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain, and bodily health), but not including a statement of memory or belief to prove the fact remembered or believed unless it relates to the execution, revocation, identification, or terms of declarant's will."

STATEMENT OF THE CASE

On May 1, 1980, an indictment docketed to 80-00052 charged Mr. Lewis with violating 18 U.S.C. §§2, 371, 659 by having in his possession certain goods which had been stolen from interstate commerce and by conspiring with others to obtain, buy and possess this meat. The goods allegedly possessed by the Defendant included the following:

> Count I: 450 cases canned hams stolen in Mechanicsburg, Penna. on July 3, 1979.
>
> Count II: 603 boxes of beef stolen in Campbelltown, Penna. on July 30, 1979.
>
> Count III: 581 boxes of beef stolen in Chambersburg, Penna. on August 12, 1979.
>
> Count IV: 1,748 cases of spices and cheese stolen in Denver, Penna. on September 9, 1979.

After a substitution of counsel and the failure of previously initiated plea bargain negotiations, a superseding indictment was returned on October 30, 1980, charging the Defendant with the following acts of possession:

> Count I: cases of canned hams stolen from Mechanicsburg, Penna. on July 3, 1979 (July 10, 1979).
>
> Count II: cases of canned hams stolen from Mechanicsburg, Penna. on July 3, 1979 (July 11, 1979).

Count III: beef stolen from Campbelltown, Penna. on July 28, 1979 (August 6, 1979).

Count IV: beef stolen from Campbelltown, Penna. on July 28, 1979 (August 7, 1979).

Count V: spices and candy stolen from Denver, Penna. on September 9, 1979 (September 10, 1979).

Each indictment contained, as its last count, a conspiracy count.

Furthermore, upon the failure of such plea negotiations and based thereon, the Defendant was indicted on October 30, 1980, for possessing a television set on or about June 26, 1980, which television set had been stolen from interstate commerce. This indictment was docketed to 80-00125. The ultimate increase in punitive exposure was from forty-five (45) years to fifty-six (56) years with attendant increases in the maximum possible fine.

Pre-trial motions were filed alleging the appearance of prosecutorial misconduct and requesting the dismissal of both October 30 indictments. These motions were denied and the trial of 80-00052 began on January 5, 1981, with a jury picked on December 22, 1980.

During the trial the following evidence was developed from the Government's case. (The review of evidence hereinafter will be limited to evidence relevant to Counts III and IV, the counts of conviction.) A certain truckload of IBP beef left Emporia, Kansas, headed for Long Island, New York, and never arrived. The cargo of that truck included boxes of beef tenderloins, 7 pounds and under, which boxes were stamped with the date and site of their manufacture but with no information as to their

destination, date of departure or the identity of the delivering truck. An IBP official testified that: after leaving the packing house the meat could be legitimately resold by its authorized recipient to any other wholesaler, retailer or private buyer; and that meat often lingered in Emporia for as long as one week after its manufacture before shipping out.

After the meat's apparent theft from an unattended truck in Campbelltown, Pennsylvania, a certain delivery of meat was made to the M.F. Eshleman Meat Company (MFEM) in Lemoyne, Pennsylvania; included in this meat were cases of IBP tenderloins marked with the origination point of Emporia, Kansas. Thereafter, Mr. Lewis admittedly made two purchases of tenderloins from MFEM totalling approximately 20 boxes and paying $1.00 per pound, whereas the partners of MFEM testified that MFEM's more common price for similar meat was between $2.85 and $2.95 per pound. All MFEM partners testified that they received this meat from Dinko Blaskovic and Dan McCorkel who identified it as salvage meat, following a meeting attended by Puliti, Eshleman, Herrold (MFEM partners), McCorkel, Blaskovic, Albert Pugliese and possibly Mr. Lewis, at which they discussed MFEM's possible interest in buying future loads of salvage meat.

All partners testified that after reading a newspaper article about the theft of the so-called "Campbelltown Load", they became suspicious and discussed among themselves the chance that the meat they received was stolen. Puliti further testified that he made some comment to either Mr. Lewis or Mr. Pugliese about this suspicion. All partners, critically, testified that they had *never* discussed stolen meat with the Defendant nor had

he ever mentioned to them, nor they to him, that the meat was stolen.

Puliti also testified that after the FBI conducted a warrantless, consensual, search of the MFEM premises and seized certain items, he called Mr. Lewis to tell him about the search and Mr. Lewis said, "I'll take care of everything." Shortly thereafter, at about 12:00 midnight, Dinko called MFEM and was advised about the FBI visit. Mr. Lewis denied receiving this phone call and swore that he learned about the incident when one of MFEM's route drivers announced its occurrence at about 7:00 p.m. that night in the Poor Boy Restaurant, where Mr. Lewis was present as a patron.

The Defense evidence included the Defendant's testimony that he had bought certain meat from MFEM believing it to be salvage goods, that being the way the partners had consistently described it. An insurance adjuster testified that salvage goods are regularly sold for one-third of their wholesale value, or less; making the $1.00 per pound price reasonable.

During the trial the following evidentiary and legal problems arose:

(a) The Defense sought to introduce prior inconsistent statements of prosecution witness Hugo Puliti via the testimony of Defense Investigator Detective Stanley Gochenour. This evidence was excluded by the Court upon the prosecution's objection that Puliti had not specifically denied making those statements.

(b) The Defense then sought to call Detective Gochenour to testify that Puliti in making the prior

inconsistent statements had prefaced them with a statement of his intention to tell the truth to Detective Gochenour; but he added that he was afraid to give similar truthful testimony at Mr. Lewis's trial for fear of the negative impact such truthful testimony would have upon his sentence, due to the Government's disfavor. Puliti had pleaded guilty pursuant to a plea bargain and was awaiting sentence when he testified. The Court, upon the objection of the prosecution, excluded this offered testimony ruling that this "question" should be more properly addressed to Mr. Puliti.

(c) The Court ruled that evidence of the witness' statements of intent was "hearsay". The Court further ruled that it was not admissible under F.R.E. 803; and that the evidence could not be admitted because the witness had not been first confronted with his prior statement of intent, ruling that F.R.E. 613(b) applies to statements of intention.

After deliberating for about nine hours, the jury returned a message to the Court stating their inability to reach unanimous verdicts as to all counts. Accordingly, the Court accepted the verdicts as reached. The final result was: not guilty verdicts on Counts I and II; guilty on Counts III and IV; and mistrials on Counts V and VI, based upon the Court's finding of manifest necessity due to the failure of unanimous verdicts.

The next day, the trial of No. 80-125 began with a jury previously selected. Immediately before trial, the Government presented a motion to amend the indictment, requesting that the date of the alleged act of possession

be changed from June 20, 1980 to May 20, 1980. Over the objection of the Defendant, the Court granted this motion. The Defense next moved for a continuance based upon its surprise at the amendment, the need to materially alter the Defense theory, and the need to pursue investigative leads to find a now critical witness. The Court denied this motion despite the Defendant's advising the Court *that he was not prepared* to try the case upon the surprising amendment to the indictment.

The Government's case contained the following evidence: a television set was stolen from interstate commerce on May 15, 1980. In the autumn of 1980, Mr. Lewis brought his wife Joan Lewis a television set upon the request of either her or their children. In February of 1980, Detective Ronald Fernsler of the Swatara Township Police, responding to an anonymous tip, visited Mrs. Lewis' home and recorded the serial number of a television which he found in her home. The number matched the number of the stolen set. In May, 1980, Mr. Lewis retrieved the television set. During this general time period (late May, early June, 1980) Mr. Lewis allegedly made two statements to Mrs. Lewis: "You wouldn't testify against me, would you?" (significantly, there was ongoing domestic litigation between Mr. and Mrs. Lewis at this time) and "Did you tell anyone about the television set?"

With respect to both cases, the Defendant filed post-trial motions.

These motions were briefed and decided against the Defendant on all grounds. Subsequently, the Defendant was sentenced to concurrent terms of two years for each count and each conviction. He then appealed to the

United States Court of Appeals for the Third Circuit, which granted his motion to file a consolidated brief for numbers 81-2065 and 81-2066.

The appeal was orally argued and the District Court's judgments affirmed. Upon the Defendant's timely petition for rehearing the Court of Appeals issued an order on March 17, 1980 denying rehearing.

REASONS FOR GRANTING THE WRITS

I. The Opinion of the Circuit Court Is Such a Departure From the Usual Course of Judicial Proceedings, and Has so Far Sanctioned Such a Departure by the District Court, as To Call for an Exercise of This Court's Power of Supervision

In the trial of 80-00052 in the District Court, the Defendant offered evidence that the Government's star witness, Hugo Puliti, had expressed two statements of intention during a pre-trial interview: (1) Puliti said he intended to tell the truth during the interview; and (2) he did not intend to tell the truth during the trial because he was afraid of losing the benefits of a previously negotiated plea bargain. After these statements of intent, the Defense investigator, Detective Stanley Gochenour, interviewed Puliti and took several additional statements from him.

Primary among these statements was Puliti's statement that the Defendant was *not* at a meeting at which the Government contended the Defendant and others devised the criminal scheme for which the Defendant was tried. At trial Puliti testified that the Defendant *was* at the meeting; he admitted telling Gochenour the opposite statement, but he contended that his trial testimony was the truth (significantly, Puliti was the only witness who placed the Defendant at the meeting).

Thus, Puliti's pre-trial statements were exculpatory of the Defendant and his trial testimony was inculpatory of the Defendant.

As such, the offered testimony contained evidence of two of Puliti's statements of intent or mental feeling and fell directly within the ambit of F.R.E. 803(3). Puliti's intention to tell Gochenour the truth at pre-trial was acceptable as evidence that he *did* tell Gochenour the truth, and would have directly refuted Puliti's trial testimony. His statement of mental feeling, reluctance to be truthful at trial, further bolstered the Defendant's contention that Puliti was *not* truthful at trial, and that the acutal truth was contained in his exculpatory pre-trial statements.

Inasmuch as Puliti was the only witness who placed the Defendant at the critical conspiratorial meeting, the Court's refusal to allow evidence that Puliti's testimony was false cannot be viewed as "harmless error".

Neither can it be contended that Puliti's admission of the prior inconsistent statements obviated the need for Gochenour's testimony. The issue which faced the jury was: When was Puliti telling the truth? He contended that he was telling the truth at trial. Direct statements from the witness that other, contradictory, statements were *in fact* the truth would have been valuable, relevant and admissible evidence on that very point.

Furthermore, the District Court's ruling, and the Circuit Court's apparent agreement, that Puliti need be confronted with his statements of intent prior to their admissibility is erroneous. Rule 803 contains no confrontation provision for statements of intent similar to Rule 613(b)'s

confrontation provision relative to prior inconsistent statements. Rule 613 (b) clearly does not apply to this situation.

The ruling of the Court below allows a witness to anticipate his own perjury, to admit it, and then prevents the adversary from proving that anticipation and intent. The law with respect to statements of intention is clearly to the contrary. *See, e.g., Mutual Life vs. Hillman,* 145 U.S. 282 (1892), and its progeny, in addition to F.R.E. 803 (3). Neither does the law require that a cross-examiner confront a witness with his statement of intent to commit perjury, or to remind him that he is obligated to tell the truth. *U.S. vs. Mandujano,* 425 U.S. 564, 581-82 (1976).

Moreover, the rights of confrontation and cross-examination, especially as to bias, implicate important constitutional guarantees. *Davis vs. Alaska,* 415 U.S. 308 (1974).

In a case where the prosecution relies largely upon one witness, the denial of cross-examination as to that witness' admission that his testimony would be false violates the Fifth and Sixth Amendments.

With respect to the trial of 80-00125, the original indictment charged the Defendant with possessing a stolen television set on June 20, 1980. On June 5, 1980, an F.B.I. agent advised the Defendant that the set was stolen and between June 5, 1980 and June 20, 1980 the Defendant dispossessed himself of the set. Accordingly, he did not possess the set on June 20, 1980 and anticipated that the government's case would fail due to an inability to

establish actual or constructive possession; such possession being a critical element of proof under the charging statute, 18 U.S.C. Section 659.

The day before trial, the Court permitted the government to amend the indictment charging possession on May 20, 1980: two weeks prior to the conversation with the F.B.I. agent, and previous to the date on which he dispossessed himself of the television set upon learning it was stolen. The Defendant moved for a continuance, which was denied.

Here, the amendment was not a "mere" change of date to which no prejudice attached. It changed the entire Government theory of the case; it destroyed the Defendant's defense; and it left him helpless during the trial. As such, the case resembled one in which the defense was alibi; any alteration of the date on the indictment is devastating. A continuance should have been allowed if the indictment was to be amended. The denial of this request was an abuse of discretion by the District Court.

Moreover, the change of the indictment was not merely a matter of form and it should have been resubmitted to the Grand Jury. *United States vs. Hall,* 536 F. 2d 313 (10th Cir. 1976); *United States vs. Hold,* 529 F. 2d 981 (4th Cir. 1975); *United States vs. Goldstein,* 502 F.2d 526 (3rd Cir. 1974). Since the indictment is the product of the Grand Jury, it is not proper for the Court to allow such a material alteration upon the Government's motion; in fact, this avenue circumvents the protection of the constitutional requirements of Grand Jury practice and the dictates of F.R.Crim.P. 6 and 7.

Although the basic and off-stated rule is that changes in time of commission of the crime are only formal, an exception exists when the discovery evidence reveals a theory of prosecution consistent with the original language upon which the Defendant depends. In such cases, the Government is not allowed to alter its entire case, prosecute at trial that which is essentially a different crime and deny the Defendant an opportunity to prepare his defense. Material changes such as this cannot be accomplished by amending the indictment. *United States vs. Pandilidis,* 524 F.2d 644 (6th Cir. 1975); *United States vs. Fischetti,* 450 F.2d 34 (5th Cir. 1971).

The Government has mistakenly taken this case to fall into the category discussed in *U.S. vs. Powell,* 564 F. 2d 256 (8th Cir. 1977), and *Krana vs. U.S.,* 546 F.2d 785 (8th Cir. 1976), by arguing that "the Defendant is unable to point to any prejudice". The prejudice suffered by this Defendant appears clearly on the record. The theory of the Defendant's case changed with the change of the indictment. The Defense told the Court *in camera* that, with the new date, it was critical to find and produce the furniture dealer from whom the Defendant purchased the television. The Defense advised the Court that the one day investigation possible since the prosecution's motion to amend had developed a lead with respect to the seller's possible whereabouts but that the information received indicated that he could not be positively located, and certainly not contacted nor served with compulsory process, for two or three days. The Court, of course, denied the Defendant's motion and granted the Government's.

The law clearly states that *material* changes in an indictment cannot be accomplished by amendment but,

rather, require resubmission to the Grand Jury. The additional test for allowing amendments to indictments is well settled in the law. The question is:

> "Whether a defense under an indictment as it originally stood would be equally available after the amendment is made, and whether any evidence the defendant might have would be equally applicable to the indictment in the one form as in the other."

U.S. vs. Fawcett, 115 F.2d 764, 767 (3rd Cir. 1946). In the instant case, the defense of the Defendant's dispossession after being advised of the possible stolen nature of the goods did not exist after the amendment. See also, *U.S. vs. Owens,* 334 F. Supp. 1030, 1032, (D. Minn. 1971). In fact, in *Krana,* upon which the Government relies, the Defendant did not even *allege* prejudice to the defense.

The law does not allow amendments to allow the Defendant to be "misled or prejudiced". *U.S. vs. Fochtman,* 421 F.2d 1019 (6th Cir. 1980); *U.S. vs. Goldstein,* 502 F.2d 526 (3rd Cir. 1974). The *Goldstein* Court went on to say:

> "While the rule is generally stated that an indictment cannot be 'amended', it may be more precise to say that a change in the indictment which is substantial and material, and not merely one of form, is not permissible."

Id. at 528. See, also, *8 Moore's Federal Practice*—Cipes, Criminal Rules, Section 7.05(1). Furthermore, in *Jervis vs. Hall,* 622 F.2d 19, 22 (1st Cir. 1980), the Court indicated that a defense motion for a continuance, and full

explication of the defense's different trial tactics but for the amendment are factors which militate in favor of a finding of prejudice.

Here, Mr. Lewis was effectively, and quite completely, deprived of his ability to present a defense. Counsel moved for a continuance upon the amendment and advised the Court of the Defendant's non-readiness to proceed. A continuance should have been granted; now the conviction must be vacated.

II. The Decision of the Courts Below as to Prosecutorial Misconduct in Plea Bargaining Procedures Is an Unwarranted Expansion of This Court's Decision in Bordenkircher vs. Hayes, 434 U.S. 352 (1978), Furthermore, There Is Considerable Confusion Among the Circuit as to the Proper Application of Bordenkircher

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Here the Defendant was indicted on two additional charges after he refused to plead guilty. The Government has admitted that the decision to bring the new indictments was a direct result of the decision to go to trial. As such, this case—involving new substantive charges—differs from *Bordenkircher,* in which only the penalty was enhanced upon the Defendant's decision to go to trial.

Bordenkircher itself recognized that it did not reverse the long line of due process cases such as *North Carolina vs. Pearce,* 395 U.S. 711 (1969), and *Blackledge vs. Perry,* 417 U.S. 21 (1974), which hold that a defendant cannot be penalized for the exercise of constitutionally guaranteed trial rights.

Since *Bordenkircher,* the rule of that case has engendered considerable confusion among the Circuits. The First Circuit remanded a District Court's denial of a writ of habeas corpus, ruling that, on similar facts, the "realistic likelihood" of prosecutorial vindictiveness required that the Defendant be discharged. *Lovett vs. Butterworth,* 610 F.2d 1002 (1st Cir. 1979).

In *United States vs. Goodwin,* 637 F.2d 250 (4th Cir. 1981), the Fourth Circuit ruled that where the Government had all the facts necessary to indict on the enhanced charges at the time that the original charges were brought (as was the situation in this case), a "genuine risk of retaliation" existed when the new charges were brought. In *Goodwin* the conviction was reversed.

In *United States vs. Andrews,* 633 F.2d 449 (6th Cir. 1980), the Sixth Circuit stated that *Bordenkircher* was a unique case and should be limited to its particular facts. The *Andrews* Court ruled that when a realistic likelihood of retaliation appears, the burden is on the prosecution to rebut that appearance. In the instant case, the Government has never given an acceptable, constitutionally proper, explanation to rebut the appearance of retaliation.

In *United States vs. Herrara,* 640 F.2d 958, 961 (9th Cir. 1981), the Ninth Circuit ruled that when the charges against the defendant are increased in retaliation for the exercise of a constitutionally guaranteed right, "the Defendant has clearly been penalized for his action" in violation of Fifth Amendment due process.

In *United States vs. Burt,* 619 F.2d 831, 836 (9th Cir. 1980), the Ninth Circuit ruled that the appearance of

vindictiveness arises upon the *prima facie* showing that the defendant has been re-indicted on more serious charges upon his decision to exercise a constitutional right. Upon this showing, the Government must show that the new charges are "justified by independent reasons or intervening circumstances which dispel the appearance of vindictiveness." That was not done in the instant case.

Prosecutors should not view *Bordenkircher* as providing a license to misuse their powers. The question is an important one requiring this Court's intervention and clarification.

CONCLUSION

For the above stated reasons, the petitioner respectfully requests that the Petition for Writs of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,
SPERO T. LAPPAS,
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Attorneys for Petitioner

Appendix

APPENDIX

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 81-2065 & 81-2066

UNITED STATES OF AMERICA

v.

ERENO LEWIS, JR.,

Appellant

On Appeal from the United States District Court for the Middle District of Pennsylvania Crim. No. 80-00052 Crim. No. 80-00125

Argued February 17, 1982

Before: Adams and Sloviter, *Circuit Judges,* and VanArtsdalen, *District Judge**

JUDGMENT ORDER

After considering all contentions raised by appellant, namely, that

* Hon. Donald W. VanArtsdalen, United States District Judge for the Eastern District of Pennsylvania, sitting by designation.

Judgment Order

A. *With Respect to No. 81-2065*

(1) the testimony of Detective Gochenour was improperly excluded; (2) the cross-examination of the MF-EM partners was improperly limited; (3) payment of a low price cannot raise an inference of actual knowledge of the stolen nature of the purchased goods under the facts of this case; (4) the prosecution must prove that the goods possessed were the same goods as those stolen; (5) the defendant's pretrial motions were improperly denied; (6) the court should have conducted an evidentiary hearing on the grand jury's manner of returning the superseding indictment; (7) the verdicts were improper.

B. *With Respect to No. 81-2066*

(1) the court erred in allowing the government to amend the indictment at the last minute and in not allowing the defendant a continuance in order to adapt his defense theory to the material change; (2) the defendant's offered witnesses were improperly excluded; (3) no recently stolen property instruction was proper; (4) Joan Lewis' testimony should have been excluded due to the marital privilege and spousal incompetence; (5) the verdict was improper.

C. *With Respect to Both Cases*

(1) there was prosecutorial misconduct with respect to the superseding indictment; (2) F.R.Crim.P. 26.2 is an unlawful and unconstitutional provision which should not have been enforced; and (3) the government's use of subpoenas for pretrial preparation was improper and unlawful; it is

Judgment Order

ADJUDGED AND ORDERED that the judgment of the district court be and is hereby affirmed.

BY THE COURT,
(s) Arlin M. Adams
Circuit Judge

Attest:
(s) Sally Mrvos
Sally Mrvos, *Clerk*

Dated: Feb. 22 1982

Order, March 17, 1982

UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Nos. 81-2065 & 81-2066

United States of America

v.

Ereno Lewis, Jr.,

Appellant

(Crim. Nos. 80-00052 & 80-00125)

SUR PETITION FOR REHEARING EN BANC

Present: Seitz, *Chief Judge,* Aldisert, Adams, Gibbons, Hunter, Weis, Garth, Higginbotham, Sloviter and Becker, *Circuit Judges,* and VanArtsdalen, *District Judge.**

The petition for rehearing filed by Appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the cir-

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* Hon. Donald W. VanArtsdalen, United States District Court for the Eastern District of Pennsylvania, sitting by designation.

cuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

By the Court,
(s) Arlin M. Adams
Circuit Judge

Dated: March 17, 1982

Memorandum

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal Nos. 80-00052; 80-00125

United States of America

v.

Ereno Lewis

MEMORANDUM

The defendant in both of the captioned cases was tried and convicted in separate trials in January of 1981 for crimes related to theft of goods from interstate commerce. He filed post-trial motions for judgment of acquittal, for a new trial and in arrest of judgment. The court addresses here those issues raised by the defendant which were supported by some citation to case law.

I. Motions Addressing Both Cases

A. *Prosecutorial Misconduct*

In December of 1980 the defendant moved for the dismissal of a superseding indictment filed in Criminal No. 80-00052 and a new indictment, filed to Criminal No. 80-00125. Defendant claimed that the two new in-

dictments "greatly expanded his exposure to criminal conviction and the potential maximum sentence which conviction would carry." He argued that the prosecutor sought the new indictments in a spirit of vindictiveness after the defendant rejected a plea agreement negotiated between former counsel and the United States Attorney's office. The court held an evidentiary hearing. Testimony revealed that the Assistant United States Attorney had informed defendant's counsel during the plea negotiations that he would bring the superseding indictment. There was also discussion of new evidence, which came to light after the first indictment, that the defendant had possessed a stolen television set. The Assistant United States Attorney agreed that the plea bargain would cover potential charges related to the television set as well as the indictment already returned by the Grand Jury. The testimony indicated that the defendant was informed that the government would seek indictment on the television charges if the plea bargain was refused.

The court finds *Bordenkircher v. Hayes*, 434 U.S. 357 (1978), controlling in the instant case. The Supreme Court introduced its legal discussion with the statement:

> It may be helpful to clarify at the outset the nature of the issue in this case. While the prosecutor did not actually obtain the recidivist indictment until after the plea conferences had ended, his intention to do so was clearly expressed at the outset of the plea negotiations. Hayes was thus fully informed of the true terms of the offer when he made his decision to plead not guilty. This is not a situation, therefore, where the prosecutor without notice brought an additional and more serious charge after plea negotiations

> relating *only to the original indictment* had ended with the defendant's insistence on pleading not guilty. (Emphasis supplied.)

Bordenkircher at 360.

Here too the bargaining related to more than the original indictment and the defendant was on notice when he determined to reject the agreement offered that the prosecutor would seek other indictments. The Supreme Court has ruled that what occurred in this case is permissible conduct.

B. *Government Use of Subpoena for a Pre-trial Interview*

The defendant seeks to have his convictions overturned because the Assistant United States Attorney subpoenaed a witness for trial and used the opportunity while she was at the courthouse to interview her prior to her appearance at trial. The incident is best understood after an understanding of the following background.

The defendant was charged in two separate indictments. The trial of Criminal No. 80-00052 was scheduled for January 5, 1981, that of Criminal No. 80-00125 was to begin with jury selection on January 12, 1981. On December 29, 1980 the Assistant United States Attorney subpoenaed Joan Lewis, the defendant's ex-wife and a major witness for the second trial, to appear on January 12, 1981. The first trial lasted longer than was anticipated. On Friday, January 9, 1981 it was continued to January 13, 1981. The court decided to proceed with jury selection for Criminal No. 80-00125 on the scheduled date since that was when prospective jurors had been notified to appear. Joan Lewis also appeared on that date

as required by the subpoena. The jury was selected but the court did not proceed with the trial. The Assistant United States Attorney interviewed Joan Lewis on January 12, 1981 in connection with the upcoming trial.

Defendant has cited two cases in support of his claim that the conduct of the Assistant United States Attorney was improper and merits some sanction from this court. Neither is factually similar to the instant case.

United States v. Thomas, 320 F.Supp. 527 (D.C. D.C. 1970), is a discussion of whether the United States Attorney's office was engaging in unprofessional conduct proscribed by the American Bar Association by using documents, which could easily be taken for compulsory process by laymen, to inform witness of a scheduled pre-trial interview. The court ordered the United States Attorney's office to cease the practice finding it deceptive in light of the fact that the United States Attorney had no power to issue its own subpoenas and could not compel attendance for pre-trial interviews. No sanction was imposed. The court noted that the office could request interviews, but could not lead the prospective witnesses to believe that the interviews were mandatory.

The second case, *United States v. Keen,* 509 F.2d 1273 (6th Cir. 1975), concerned a request that a conviction be reversed because the government prosecutor had used a trial subpoena to compel a witness to attend an interview miles from the place of trial where there was no authorized trial proceeding. The court found the practice highly improper, yet it did *not* reverse the conviction.

The case before this court has no semblance to the unauthorized or deceptive use of process condemned in

the cited cases. At the time Joan Lewis was subpoenaed to appear, the subpoena was legitimately issued after the court had ordered trial for January 12, 1981. A court proceeding in which the witness was to be involved did take place on the date for which Joan Lewis was subpoenaed. It can hardly be said that the prosecutor's failure to inform Joan Lewis that no testimony would be taken on that date and that she need not appear amounts to prosecutorial misconduct, especially in light of the continuous trial schedule in which the Assistant United States Attorney was involved from January 5, 1981. The prosecutor took advantage of her presence to interview her, saving them both the necessity of arranging another meeting. Here the subpoena was perfectly legitimate when the United States Attorney's office sought to have it issued.

II. Criminal No. 80-00052

A. *The Testimony of Detective Gochenour*

Defendant contends that the court erroneously excluded the testimony of a private investigator who had interviewed one of the co-defendants prior to trial. The co-defendant, Hugo Puliti, had agreed to cooperate with the government. At trial he testified, implicating the defendant. The defendant sought to attack Puliti's credibility by having the investigator testify that Puliti told him that he (Puliti) intended not to testify truthfully at trial. The defendant argues that this testimony should have been admitted as a hearsay exception under Federal Rule of Evidence 803(3).

Rule 803(3) permits testimony on an out-of-court statement if it is: "A statement of the declarant's then

existing state of mind, emotion, sensation, or physical condition (such as intent, plan, motive, design, mental feeling, pain and bodily health) . . . ." The defendant wanted the statement admitted to challenge the veracity of Puliti's testimony. However, statements of intent are admissible under the rule to prove that "the declarant subsequently acted in conformity with the intention, *if the doing of that act* [expressed in the declaration of intent] *is a disputed material fact.*" *United States v. Calvert*, 523 F.2d 895, 910 (8th Cir. 1975), *cert. denied*, 424 U.S. 911 (1976).

The credibility of Puliti may have been at issue but it was not a "material fact" as far as the commission of the crime was concerned. There was nothing in the record to suggest that Puliti had testified untruthfully. The court reviewed the taped interview with the private investigator and found that Puliti's statements to the investigator were consistent with his testimony at trial.

B. *Cross-Examination of Co-Defendants*

During trial three of Lewis' co-defendants testified. Defendant's counsel was permitted to cross-examine them, but he was not allowed to ask them what maximum penalties they faced as a result of pleading guilty to the indictment. The co-defendants had not been sentenced at the time of trial. The court did permit each witness to testify that he could be sentenced to prison as a result of the charges.

Defendant claims that the prohibition on questioning them as to the terms that they faced impeded his ability to establish the bias of the witnesses. Federal Rule of Evidence 403 gives the trial judge discretion to exclude

testimony "if its probative value is substantially outweighed by the danger of unfair prejudice. . . ." The court believes that to have permitted the jury to know the maximum penalty for the crimes charged would have unduly prejudiced the government's case. The jury would receive no explanation of the many factors which go into a sentencing decision, and would be left to guess whether Lewis might be subject to the same prison term if he was convicted. The defendant was permitted to explore the potential bias of the co-defendants and develop the idea that they had an incentive to testify in a manner favorable to the government. It was not necessary for the jury to know the number of years of incarceration they faced. The fact that the co-defendants faced incarceration was before them. In this court's view, the danger of unfair prejudice far outweighed the probative value of the testimony at issue.

C. *Payment of a Low Price as an Inference of Knowledge of Theft*

The jury was instructed that it could infer from payment of a low price for goods that the buyer had knowledge that the goods were stolen. The defendant maintains that this instruction was in error, particularly because the meat in question was referred to as salvage goods.

There was testimony that the value of the meat purchased by Lewis was $3.00 per pound. He bought it for $1.00 per pound. Guilty knowledge may be inferred from the fact that the purchase price of the goods was substantially below that of the market. *United States v. Infanti*, 474 F.2d 522, 525 (2d Cir. 1973). In this case

the jury was advised that it was not required to draw the inference and that the low price could be explained by other circumstances. Thus, it was for the jury to decide whether the defendant believed he was purchasing salvage or knew the merchandise was stolen.

D. *Pre-trial Motions*

Defendant claims that the denial of his pre-trial motions for a bill of particulars, for discovery, for dismissal of the indictment due to pre-indictment delay and for disclosure of electronic surveillance was error. However he does not give any examples explaining what prejudice was created at trial by this court's rulings. Absent some prejudice at trial there was no error in the denial of these motions and defendant is not entitled to a new trial or dismissal of the indictment.

III. Criminal No. 80-00125

On the day that trial of this case was to begin, the government presented a motion to amend the indictment. The indictment contains one count charging that "On or about the 20th day of June 1980" the defendant possessed a television set stolen while it was moving in interstate commerce. The government said that the date was incorrect due to a clerical error and should have been May 20, 1980. Upon presentation of the motion counsel for the defendant stated on the record:

> Mr. Lappas: Your Honor, first of all we would object to any amendment of the indictment at this time. For the sake of the record, I discovered Mr. Jones' intention to make this motion the day before yesterday. At that time, I told him I would object.

Memorandum

The FBI reports that he is referring to I received this past Monday. They do in fact say that the FBI interviewed Mr. Lewis on June five. Therefore, one of the defenses that arose to this indictment was the defense of dispossession.

In other words, if Mr. Lewis was alleged to have known on the fifth that the material was stolen and dispossessed himself of it in whatever manner before the date on which he is charged, then as of June 20th he was no longer in possession of the TV set. That would have been one of our defenses.

Since Monday night, we have endeavored to locate witnesses that could testify in favor of the defense based on the requested amendment. As recently as this morning, we got a strong lead as to a critical defense witness—who I would certainly discuss with the Court in chambers—who according to our information is currently in the state of Florida on business and will return to his home which is in the state of North Carolina on or about this Friday. Until that time, he cannot be reached. For that reason I would state for the record that the defense is not prepared to proceed pursuant to the requested amendment.

At the time the amendment was requested the defendant's objections seemed to be that he was surprised by the proposed change and unprepared to go to trial. This was not a complex case. Defendant, by his own admission had two days' notice of the proposed change. Upon further consultation with counsel, the court determined that counsel had no definite knowledge of exculpatory evidence. He merely wished for time to explore a lead.

Memorandum

In the post trial brief the defendant does not substantiate any prejudice which resulted from the court's refusal to grant a continuance, other than to say that he had to re-think the defense. In light of the notice the defendant had that the Assistant United States Attorney was going to request the change, the court does not believe that additional time for trial preparation was necessary. Though the brief alleges that "new witnesses became critical," it in no way explains who these witnesses would have been or how their testimony would have been exculpatory.

Defendant argues that the matter of changing the indictment should have been resubmitted to the Grand Jury. The court disagrees. The date at issue in the amendment was not material to the crime. Possession of a stolen television set would have been a crime any day of the year. When time is not an essential ingredient of the offense charged, a change in dates in the indictment does not create a substantial variation requiring action by the Grand Jury. *United States v. Goldstein,* 502 F.2d 526 (3d Cir. 1974).

(s) Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: May 8, 1981

Order, May 8, 1981

UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

Criminal Nos. 80-00052, 80-000125

United States of America

v.

Ereno Lewis

ORDER

IT IS HEREBY ORDERED:

1. Defendant's post trial motions for a judgment of acquittal for a new trial and in arrest of judgment are denied.

2. Sentencing is scheduled for 9:30 a.m. on May 22, 1981.

(s) Sylvia H. Rambo
Sylvia H. Rambo
United States District Judge

Dated: May 8, 1981